No. 2431

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,

Appellee.

PETITION FOR REHEARING.

ASH SHEEP COMPANY,
By C. B. NOLAN,
WM. SCALLON,
Its Solicitors.

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UNITED STATES OF AMERICA,
Appellant,

vs.

ASH SHEEP COMPANY, a Corporation,
Appellee.

PETITION FOR REHEARING.

The appellee, Ash Sheep Company, respectfully petitions this Honorable Court for a rehearing in the above entitled cause, particularly with respect to the money judgment prayed for in the bill of complaint and in support of this petition, the appellee respectfully shows:

That in the bill of complaint herein, the appellant asks to recover the sum of seventy-one hundred dollars for and on account of grazing of sheep, on the lands in question, by the appellee, it being alleged in paragraph V (Tr. p. 4) that since the 14th day of July, 1913, the defendant had been grazing about seventy-one hundred head of sheep upon the lands in question " in violation of the rules and regulations of the Secretary of the Interior of the United States and said Act of Congress aforesaid." The act referred to is the act relating to the Crow Indian reservation. The amount asked for is at the rate of one dollar a head. That is the amount of the penalty provided for by Section 2117 of the Revised Statutes of the United States, which reads as follows:

> "Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock."

This is clearly a penalty. It is well settled that equity never enforces a penalty.

In

> Marshall v. Mayor and City Council of Vicksburg, 15 Wall. 146,

it is said:

> "Equity never, under any circumstances, lends its aid to enforce a forfeiture or penalty, or anything in the nature of either." (Citing Livingston v. Tompkins, 4 Johns. Ch. 415; Story Equity Jurisprudence, 2nd Vol., Section 1319).

Story in the section referred to says:

> "It is a universal rule in equity never to enforce a penalty or a forfeiture."

The rule is thus positively established that a penalty will not be enforced in an equitable action. The suit at bar is one in equity. It, therefore, follows that the penalty cannot be recovered in this action, if at all, and that part of the prayer of the bill which relates to the penalty cannot be granted. Objection was specifically raised by the answer to the joinder of this claim for penalty. The answer averred:

> "Further answering said bill of complaint, defendant alleges that in the bill of complaint there are set forth two causes of action which cannot be joined, to wit, a cause of action in equity asking for injunctive relief on account of trespasses alleged to have been committed, and a cause of action for the enforcement of a penalty, pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and that by reason thereof in the bill of complaint in question there is a misjoinder of causes of action.

> "Further answering said complaint and that portion of same where damages are sought for the sum of seven thousand one hundred dollars, defendant avers that the claim for damages in question is made pursuant to the provisions of Section 2117 of the Revised Statutes of the United States, and as such, is a claim based on the enforcement of a penalty, and as such, is a claim that cannot be enforced in equity." (Tr. pp. 14-15).

These defenses were thus properly presented. (Equity Rule 29). The plaintiff may not join causes of action not cognizable in equity. Rule 26 permits the joinder of causes of action "cognizable in equity," but does not permit the joinder of actions not cognizable in equity with equitable causes.

Moreover Section 2117 does not, and can not apply in this case. That section applies to land of which the tribe has possession, and over which it exercises control. That is evident from the clause "without the consent of such tribe." The lands here in question were not in the possession or under the control of the tribe. The decision holds that they were not public lands, but were "lands held by the United States as trustee for the Crow Indians, for disposal," etc.

The Indians had been removed, and the lands were held for sale and open to entry in pursuance of the provisions of the act of cession. The tribe could not have given any consent as to these lands. So, they were not within the spirit or the letter of Section 2117.

This contention is altogether consistent with the decision of this Court, regarding the character of the lands.

The answer also contains the following denials. In subdivision VI of the answer (Tr. page 13), after admitting the grazing, comes this denial:

> "Denies that its doing so is a trespass, and denies that the grazing of said sheep will materially or at all destroy the value of said lands."

In sub-division VII (Tr. page 14), are the following denials:

> "Denies that in consequence of the acts of defendant, complainant or the Crow Indians have been deprived of the benefit of said lands, and denies that by reason of the acts charged, or of any other acts, the Crow Indians and the complainant, or either of them, have or will sustain damage in the sum of seven thousand one hundred dollars, or any other sum or amount.
>
> "Denies that the acts charged in the complaint are contrary to equity and good conscience, or either, or tend to the manifest injury of the complainant.
>
> "Further replying to said paragraph, denies that complainant is without remedy at law, and denies that relief is obtainable only in equity."

The bill having been dismissed on its merits, the decree of the court below made no reference to these points, but the reversal of the decision makes it necessary to consider them. Appellee, therefore, respectfully represents that it should not be ordered that a decree be entered in favor of the complainant for the relief prayed for in its bill, but the order should be limited to granting to the complainant the injunction prayed for, and that, regarding the money judgment sought to be recovered, the bill should be dismissed, or the money recovery limited to nominal damages. Appellee does not go to the extent of asking that the whole bill be dismissed on account of the misjoinder, but it does respectfully insist that the money matter should be eliminated by dismissal, or disposed of as above suggested.

The money demand can only be for one of these two things, viz, the statutory penalty, or, unliquidated damages. If the claim be for the penalty, it must be denied, because equity will not enforce it, and because of the misjoinder as well as because Section 2117 does not apply. If the claim for money

be regarded as one for unliquidated damages for trespass, then, we make three points regarding it:

1st: If it could be deemed to be cognizable in equity in this case, substantial damages could not be allowed, because the damages were denied in the answer, issue was made in respect thereof, and no evidence of damages was given The case was submitted upon the bill and answer as appears by the decree. (Tr. page 23). Therefore, only nominal damages could be allowed, if any.

2nd: By submitting the case upon the bill and answer, the plaintiff waived any claim to substantial damages. It is, of course, elementary that unliquidated damages (unless admitted) can not be recovered without proof. The rule applies even in default cases. By submitting the case without evidence, the plaintiff necessarily abandoned all claim to substantial damages.

3rd: If the money claim be not cognizable in this case, then, of course, no money recovery can be had in this action.

WHEREFORE the appellee, without waiver or prejudice regarding other parts of the decision, respectfully prays that a rehearing be granted and that upon such rehearing the decision and order made by this Honorable Court be modified, as above suggested, with respect to the money demand contained in the bill of complaint.

ASH SHEEP COMPANY,
By C. B. NOLAN,
WM. SCALLON,
Its Solicitors.

CERTIFICATE OF COUNSEL.

We the undersigned, C. B. Nolan and Wm. Scallon, of counsel for the appellee, the Ash Sheep Company, now petitioning for re-hearing, certify that the foregoing petition for re-hearing is, in our judgment, well founded, and that it is not interposed for delay.

C B Nolan

Wm Scallon